BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

We will deal with the two errors complained of in our preceding petition separately, and endeavor to be as direct and concise as possible, in accordance with paragraph 2 of Rule 38 of this Court. The question, of course, of whether there were two separable alleged schemes to defraud, as we contend, or only one continuing scheme, as the trial judge charged the jury, necessitates some reference to the facts; and our complaint of the admission of improper so-called "intent" evidence requires us to review that evidence; and we will do these things as briefly as possible, but ask your Honors to remember the trial was a somewhat lengthy one and bear with us in this application accordingly.

TWO SEPARABLE SCHEMES

It is necessary to show at least a skeleton of the facts of the contract price increase of 1936, and the padded extra bill of 1937, to show the remoteness, as far as Weiss was concerned, at any rate, between the two events, in point of time, place, plan and details.

On January 6, 1936, the building in question at Louisiana Polytechnic Institute burned. The college had no money to replace this building. Like the school itself, the State Board of Education did not have any money to replace the building, and, pending such time as the Legislature would meet, the school was dependent upon the Governor to obtain any money for this purpose. About two weeks after the building burned, Richard W. Leche was nominated for the governorship of Louisiana for the four-year term to begin the following May. This is the

same Governor Leche during whose administration, in 1939, the recent notorious scandals in Louisiana public life were disclosed, and who is himself now under conviction, pending appeal to this Court, for mail fraud.

Before Governor Leche took office, the State Board of Education received bids to construct this building, and Caldwell Bros. & Hart were low with a bid of $264,-482.13. The Board awarded the contract at this price, and all bids were tabulated by the architects and copies of the tabulation placed on file in the Board's office at Baton Rouge and published in full in the Board's customary printed bulletin.

The minutes of the meeting, at which the bids were opened, recited that the governor would poll the members of the Legislature for permission to obtain the necessary funds, and Mr. Caldwell, the member of the contracting firm who was present, said it would be satisfactory to hold the bid open until the members of the Legislature were heard from. Between this action of the Board on April 4, 1936, and until the Legislature met in regular session on May 11, 1936, no steps were taken to poll the members of the Legislature for any funds to carry out the proposal to construct this building. Even after Leche became governor on May 12, 1936, and the Louisiana Legislature sat in regular session from May 11th until June 9, 1936, no measure was ever introduced, at the instigation of the governor or anybody else, to obtain an appropriation for any money to construct this building at Louisiana Polytechnic Institute.

According to the testimony of petitioner Weiss, on May 20, 1936, eight days after Leche became governor, the former co-defendant Hart visited Weiss in the latter's office in New Orleans and informed him that he, Hart, had seen Governor Leche; that Governor Leche was ready

to go ahead with the building, but would not be able to raise the money for some time and wanted the contractors to support the expenses of the job in the meanwhile; that for this Governor Leche had agreed to pay the contractors $27,000.00 additional, which was still lower than the next lowest bid, and that the governor wanted Mr. Weiss to draw the contract accordingly. Weiss immediately telephoned Governor Leche in Baton Rouge and obtained an appointment to see him next day. He told the governor on this visit that he had drawn the contract in accordance with what Hart had told him, and had brought it to Baton Rouge with him, but that he did not desire to release the contract at the increased price until he had confirmed from the governor personally that the instructions conveyed by Mr. Hart were correct. The further testimony of Weiss was that Governor Leche told him it was correct that he had agreed to pay the contractors the additional amount of $27,000.00, assigning a number of reasons for the larger price; and accordingly Weiss drew and released the contract at a price of $291,482.13.

Subsequently the contractors did carry the total cost burden of the job from May until October, 1936, Governor Leche finally beginning to pay their estimates, through a State Board of Liquidation loan, and allocations from a special fund for public building purposes under his discretionary control, in the latter month.

On the trial of Weiss, Governor Leche was called as a witness in rebuttal by the government and denied any knowledge of the enlargement of the contract price. His testimony was given long after he had resigned as governor and shortly after his own conviction for mail fraud in connection with the purchase of highway department trucks.

We have, though briefly, reviewed the foregoing

facts of what Weiss claims occurred in May, 1936, for the purpose of showing your Honors what the jury had to decide about this portion of the case, and how different it was from what the jury had to decide regarding events in the following year. We venture to say that the explanation of the increase in the contract price in 1936 which was made on the witness stand by Weiss was, in the light of all the surrounding facts and circumstances, a reasonable one, and, but for the denial of the incident by Governor Leche himself, might well have satisfied the jury that Weiss had been justified in thinking that Governor Leche not only had legitimate reasons, but possessed legal authority, to order the upping of the said contract price. In other words, the issue on this branch of the case was largely a question of which jurors believed that Weiss was telling the truth, and which jurors believed that Leche was telling the truth.

The issue before the jury on the other branch of the case was vastly different. Here was a question of whether, in approving Hart's inflated bill for extras at the tail end of the job, Weiss had acted knowingly and corruptly, or had issued the final certificate in the excessive amount through ignorance and negligence. Furthermore, there was nothing to show any continuity or fraudulent conduct on the part of Weiss between May, 1936, and May, 1937, to warrant an assumption of any participation by him **in a single scheme** to generally defraud the school.

On this branch of the case the surrounding facts and circumstances again supported the explanation given by Weiss. He had never had anything to do with the actual supervision of construction on the ground, which had been left to the associate architects in Shreveport. He had never even visited the scene during construction. His office had no accurate records of extras on the job.

He signed a final certificate on the strength of a bill for extras prepared by Hart, and at a time when he (Weiss) was very busily engaged, working day and night, preparing the plans for the huge new Charity Hospital building at New Orleans, since constructed.

Hart, having induced Governor Leche in May, 1936, according to the testimony of Weiss, to grant his firm a price increase of $27,000.00, a whole year later (according to the testimony of Hart's bookkeeper Seybold) sat down one day and drew up a final bill which included extras on the job, the value of which he deliberately inflated by over $29,000.00. There is no evidence in the record to show, nor from which it might even be assumed, that what Hart did about the end of March, 1937 (as Seybold fixed the time), was a continuing episode in a fraud which he and Leche, or he and Weiss, had begun to perpetrate in May, 1936. Even as to Hart, what he did at the later time might have been an entirely new and original thought, a scheme not devised, even in his own mind, before the time he sat down with his bookkeeper Seybold and gave it effect by writing out the false bill for extras. It is proportionately even more remote that in such a negative state of the record, Weiss should be charged as an accomplice all through the year to a plan not devised by the chief actor, Hart, until about the end of March, 1937, and possibly not even known in any wise to Weiss until as late as May 17, 1937, the date of issuance by the architects of the contractors' final certificate.

What we are trying to bring out in sharp focus is that under our foregoing outline of both branches of the alleged fraud there existed two separate and dissimilar factual situations. It was not as though Hart and Weiss were selling bogus stock through the mails, and having

sold one share to Black and another share to White, it would be obvious to any juror that if one deal was fraudulent the other was bound to be. That could be reasonably accepted as a single scheme. The same material proof, the same issue, would be before the jury. A finding of guilt would necessarily imply that all twelve jurors had found that, in the opinion of each, the defendant was guilty of the same fraud which all of them had in mind when they voted their verdict.

But in the case at bar the jurors faced two problems simultaneously. They knew that letters had been mailed which related to the work of Hart's firm and Weiss' firm at Ruston. They had to find **unanimously,** however, that each of those letters was in execution of a fraudulent scheme on the part of Weiss. Let us say that jurors 1 to 6 believed Weiss against Governor Leche in the event of 1936, and felt that Weiss had acted in good faith in the $27,000.00 contract price increase, but they concluded that Weiss had conspired with Hart in 1937 to pad the extras in the final estimate. Jurors 7 to 12, on the other hand, thought Weiss had been merely negligent in what he did about the final certificate in 1937, but that he had lied about Governor Leche's authorization to increase the contract price in 1936.

The trial judge having told them it was all one single scheme to defraud, and letters having obviously been mailed, jurors 1 to 12 vote for conviction, and it is apparently a unanimous verdict. And yet, in basic result, Weiss has been tried at the same time and by the same jury for two different, separable and distinguishable alleged fraudulent devices, between which two devices the minds of jurors (as to defendant's guilt or innocence) may have actually disagreed, less than the necessary legal number finding him guilty on one device, and less than

the necessary legal number finding him guilty on the other device, thus only **seeming** to agree on the face of the verdict as returned.

It is not fair to contrast the case at bar with the common, the most common example, of a bogus stock swindle to numerous victims through the mails. There the identical nature of the sales is a justification of the extension of the rule of single offense counts. It is not logically to be expected that, on identical sales, one juror would hold the sale to Black was fraudulent, and another juror would say the sale to White was fraudulent, creating a non-unanimous verdict as to use of the mails in execution of fraud. The illogical character of that kind of an argument should not be allowed to destroy the appeal for due process which Weiss makes in a case where the two accusations of wrong-doing in one count can be fairly distinguished one from the other, **and reasonable men could logically differ in their findings of guilt or innocence as between the alleged offenses.** When this sort of situation arises, as it has most certainly arisen in the case at bar, the courts of the land should be prompt to defend the constitutional right of an accused to be tried, clearly and unambiguously, for only one offense at a time, so that the unanimous verdict of the necessary twelve jurors under federal law may at all times be unequivocal upon the issue of his guilt or innocence.

What we have said in the foregoing is applicable to all of the counts of the indictment, but it becomes particularly pointed when we apply it to Count 1 under which Weiss was sentenced. The mail fraud law does not deal with generally corrupt inclinations or anti-social intentions. It deals with "schemes" or "artifices", or "pretenses", "representations", or "promises". There may be a single continuing generally evil intent on the part of an

individual, who expresses it intermittently by a definite "scheme" or "artifice" to defraud, or a "pretense", "misrepresentation" or "promise" in order to obtain money or property. If he uses the mails to execute the definite "scheme" or "artifice" to defraud, or the obtaining by "pretense", "representation", or "promise", which he has conceived or made, he violates the law. But the intermediate existence of an evil inclination cannot consolidate two distinct "schemes" or "artifices", or "pretenses", "representations", or "promises", into a single one when by nature they themselves are different from each other. If between the two "schemes", "artifices", "pretenses", "representations", or "promises", he uses the mails to further the one already existing, that mailing cannot be in execution of the subsequent "scheme", "artifice", "pretense", "representation", or "promise", and the jurors should not be told by the court that they shall decide the question of criminal use of the mails by the sending of such an intermediate letter on the basis that both the previous and the subsequent alleged fraud must be regarded as one single transaction. On such a basis a juror would reach the ridiculous result of saying an accused was guilty of a mail-fraud by something he did in May (which the juror thought was fraudulent) because he had mailed a letter in March about something he had done in January (which the juror did not think was fraudulent, but the Court had instructed him it was all one transaction, so what could the juror do about it? He had to take his law from the Court). Such is our procedural situation under Count 1, where the letter was mailed on March 3rd, 1937, after a possibly fraudulent transaction in May, 1936, but before a possibly fraudulent transaction in May, 1937, and the juror (who might not have decided the transaction in 1936 was at all fraudulent) is instructed to regard it as all one single scheme to de-

fraud. So if he does think the subsequent transaction in May, 1937, was fraudulent on the part of defendant Weiss, he is justified, under the Court's instructions, in holding that the prior letter of March 3rd, 1937, under Count 1, was mailed in execution of a scheme to defraud.

As we have said, it is not an evil inclination which the mail fraud law resists. It is the creation of tangible "schemes" or "artifices", the making of false "pretenses, representations or promises". The alleged artifice or scheme of 1936 in this case was to increase a contract price; there was a false pretense that the correct price was $27,000.00 more than it actually should have been. The reward for this trickery, if trickery it was, would be one amount, $27,000.00. Belief of a juror in the existence, or non-existence, of fraud here would depend on a state of facts which was complete by the end of May, 1936. On the other hand, the alleged artifice or scheme of 1937 in this case was to present a false bill for extra work; here was an entirely different, independent, false pretense that the true value of extras was about $29,000.00 more than it really was, which amount would be the reward of that trickery, and trickery on Hart's part we are sure it was. Belief of a juror in the existence, or non-existence, of fraud in this instance would depend on a new state of facts which did not begin to exist until at least the end of March, 1937.

Between the two alleged artifices, the two false pretensions, one in May, 1936, the other after March-end, 1937, there is not a fact in the record to demonstrate continuing fraud on Hart's part, much less on the part of Weiss. The government's whole case that the **two** transactions were **one** scheme is founded on nothing more than an assumption of a generally evil inclination over the intervening year on the part of not only the chief

actor, Hart, but the secondary figure in the case, Weiss, as well.

As indicative of the fact that the Circuit Court of Appeals for the Fifth Circuit did not grasp, in its original opinion, the true aspect of our complaint that Weiss had been tried on two schemes to defraud at one time, that Court cited the five following cases in support of the "one scheme" contention:

Sunderland v. U. S., 19 Fed. (2) 202;
Sconyers v. U. S., 54 Fed. (2) 68;
Belt v. U. S., 73 Fed. (2) 888;
Morris v. U. S., 112 Fed. (2) 522;
Leche v. U. S., 118 Fed. (2) 246.

The first listed case, the *Sunderland* case, was from the Eighth Circuit; the other four are from the Fifth Circuit.

Every one of these cases deals with a simultaneous transaction, and they are cases not fairly to be compared with the case at bar. We will take them in reverse order in point of time.

In the *Leche* case there was one general scheme to buy motor-trucks under fraudulent circumstances. The scheme resulted in two purchases, identical in system, and provable by the same witnesses and practically the same evidence. There was no room for a juror to make a distinction of guilt or innocence between one sale or the other sale, under the same arrangements and with the same people. This is entirely different from the situation in the case at bar, where there are two separate sets of facts, transacted through different witnesses, and where a distinction might be reasonably made as to guilt or innocence in one or the other.

In the *Morris* case there was one single and general

scheme to sell fake life insurance policies, with 11 mailing counts. The contention was that these counts were duplicitous, not by reason of different factual schemes being included in the same count, but because "the indictment contained or united two offenses (see page 526), one a scheme **to defraud** and the other a scheme or artifice **to obtain** money by false pretenses." The court answered the contention by citing its previous decision in *Livezey v. U. S.*, 279 Fed. 496, where it was said: "It is not pointed out in argument that there is a difference between a scheme to defraud and one to obtain money by false and fraudulent representations, and we are unable to perceive any."

The *Belt* case likewise involved only one scheme. This was a scheme to induce divers persons to subscribe and pay for shares in a venture to manufacture and market helium gas and dry ice. There was only one scheme, and seven mailing counts on the one scheme in the indictment. There was not even a contention in the case by the appellants that more than one scheme was involved. The contention was that the indictment was duplicitous "in its allegations of **the several representations** complained of as being false and fraudulent."

In the *Sconyers* case, Sconyers was charged with a scheme to sell interests in land which he falsely represented contained oil and gas. He was said to have conducted fraudulent selling campaigns by mail. There were five tracts of land involved, and while none of the letters used in the mailing counts referred to all the tracts of land, the swindle was identical in its facts throughout.

The Fifth Circuit Court said: "A letter may be used for the purpose of executing a scheme to dispose of several tracts of land, although it refers to only one of such

tracts; for the advancement of any part necessarily aids in the execution of the entire scheme."

Then the Court made a further significant observation:

> "What appellant really complains of is a possible variance between the indictment and the proof; but such variance, if any existed, is not shown **and could not in any event be taken advantage of by demurrer to the indictment."**

We say the last quoted paragraph is significant because we are sure that what the court had in mind in this *Sconyers* case has come to pass in the case at bar. In other words, this decision was upon demurrer. It virtually says that if there turned out to be a variance between the indictment and the proof, then the decision would have been different. And in the case at bar that is what happened. The indictment alleged that there was only one scheme, and the trial judge so charged the jury, **but the fact remained that the proof demonstrated the absence of any showing of a contemporaneous continuing plan of double fraud;** on the contrary, the testimony of Seybold showed that in point of time of their existence, the two schemes were separate, independent and remote from one another, **and the later scheme was subsequent to the mailing in Count 1.**

In the *Sunderland* case, there was a general related scheme to sell certain corporate securities on false representations, and by use of the mails. While the scheme was complex, its details were contemporaneous, and the narrative was proved by the same general evidence, which is not the situation in the case at bar.

It is, of course, elementary that two separate offenses cannot be included in one count of an indictment. *U. S. v. Dembowski*, 252 Fed. 894; *U. S. v. Blakeman*,

251 Fed. 306. And where two distinct offenses are each set out in adequate terms, an indictment is bad for duplicity, **and neither allegation can be rejected as surplusage.** *U. S. v. Patty*, 2 Fed. 664.

It must be borne in mind that we are not now dealing with two offenses growing out of the same set of facts and pleaded in the conjunctive, such as a charge that the accused did a certain act and attempted so to do. This is permissible. But separate and distinct acts, involving different proof, and not arising out of the same facts, cannot be consolidated, especially where the acts done are of such different nature that the jury might regard one as corroborative of the other, or divide in their conclusions as to the set of facts on which guilt should be found. *Kidwell v. U. S.*, 38 App. D. C. 566.

The contention that the gist of the offense is the mailing can not excuse the duplicitous nature of the count as to the essential element of the offense that the accused must have devised a scheme to defraud **in execution of which** the mailing took place. *Hass v. U. S.*, 93 Fed. (2d) 427; *U. S. v. Buckner*, 108 Fed. (2d) 921.

These two last-cited cases present the closest parallels to the case at bar which we have been able to find. The *Hass* case was decided by the Eighth Circuit Court of Appeals in 1937. It was the case of the merger of two fraternal insurance societies, the Modern Brotherhood and the Foresters. The defendants were indicted in five mailing counts and one conspiracy count. In that case the indictment was founded on the assumption by the government attorneys that the plan, to divide $300,000.00 between certain officers of the Modern Brotherhood to be obtained by engineering the merger, was contemplated by the defendants from the very beginning of the transaction, just as the prosecution now **assumes** that the

padding of the extra work account in 1937 was contemplated by Weiss from the very beginning of the Louisiana Polytechnic contract.

The Eighth Circuit Court reversed the conviction, saying (93 Fed. (2d), at page 435):

> "There is, we think, another rather obvious defect in the evidence. The five notices described in the indictment were mailed to delegates not later than November 27, 1931. The convention was held December 9, 1931, and the $300,000 was divided among the defendants on December 16, 1931. Unless the scheme to defraud existed prior to the dates of the mailing of the notices, the mailing of them could not constitute a misuse of the mails under section 215, Criminal Code, 18 U. S. C. A. Sec. 338. Chew v. United States, 8 Cir., 9 F. 2d 348, 352; Gammon v. United States, 8 Cir., 12 F. 2d 226, 228. The evidence which tends to prove that the scheme devised by the defendants with respect to the obtaining of the $300,000 existed prior to the mailing of the notices, **we regard as inadequate to establish that fact.** There is evidence indicating that the defendants had knowledge of the 'special contracts' before the notices were mailed, but no competent evidence that prior to that time they had planned that Parks should divide the $300,000 with them. There are only two items of evidence that we have been able to find which indicate that the scheme sought to be charged ante-dated the mailing of the notices. Mr. Sherin, the former secretary of the Modern Brotherhood, testified that some time after the merger, at a meeting where all of the defendants were present, he asked Mr. Parks how long had the boys known that they were going to get this money (the $300,000) and he (Parks) said 'all the time'. A Mr. Patton, a post office inspector who had interviewed Parks in 1934, testi-

fied: 'Inspector Sparks asked Mr. Parks and I also asked him if these directors or former directors of the M.B.A. did not know that they were going to receive certain sums of money because of this merger agreement, but Mr. Parks denied that they did know. However, he stated they were no chumps.' This evidence, when taken in connection with all the facts and circumstances, **might create a strong suspicion** that the defendants, prior to the dates when the notices were mailed, had planned to divide the $300,000 to be paid Parks upon the consummation of the merger, **but it hardly goes further than that.** The statement of Parks as to what the other defendants had known was a mere conclusion, and furthermore, it is impossible to tell what period he meant to cover by the words, 'all the time'. His statement to the post office inspector to the effect that the defendants 'were no chumps', is too weak a peg upon which to hang a conviction for a felonious use of the mails. It is not at all impossible that it was after the notices were mailed that those defendants who were officers and directors of the Modern Brotherhood conceived the idea of making Parks divide the first $300,000 of his commission with them. The case of Marshall v. Lovell, 8 Cir., 19 F. 2d 751, 752, presents a somewhat parallel situation in a civil case. There a trustee made the wrongful exaction from a broker just as the deal was being consummated." (Emphasis ours).

The *Buckner* case was almost on all fours with the case at bar. There the defendants had gotten into a venture, generally fraudulent in complexion, to promote the redemption by Congressional appropriation of bonds of the Philippine Railway Company. During the early stages of the proceedings, the defendants were alleged to have committed one fraud, the dissipation of expense

money which they had collected from bond-holders, in parties and entertainments apparently more for their own amusement than for the benefit of the venture. Later, they embarked on a more ambitious fraud, the manipulation of, and trading in these bonds, under information resulting from their own activities. Two of the counts (like counts 1 and 4 of the indictment at bar) were predicated on letters mailed between the first alleged fraudulent transaction, the parties and entertainments, and the second alleged fraudulent transaction, the market manipulations. The government proceeded to assume, as in the case at bar, that the whole plan was one continuing fraud, just as in the *Hass* case, and now in the case at bar, and charged the whole scheme duplicitously in each count.

The Second Circuit Court of Appeals set aside the conviction (January 8th, 1940) on the two counts which ante-dated the second fraudulent scheme, saying (108 Fed. (2d), at page 925):

> "Defendants' main objections to the indictment really go to the substance of the charges themselves and the sufficiency of the proof to support convictions on each count. If a conviction on a given count is to stand, it is not enough that there was evidence of a scheme to defraud. It must also be shown that the mails were used as part of the fraudulent scheme, **and as to each letter relied upon,** that the particular letter was not sent out **until after a scheme to defraud had been born.** Hass v. United States, 8 Cir., 93 F. 2d 427.
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> "The first seven counts in the indictment are each based on an identified letter sent through the mails. Counts one and six concern solicitation letters signed by Buckner, sent to bondholders on or about July 7 and 8, 1937, respectively. Counts

two, three, four, and seven are based upon letters requesting donations to the committee or acknowledging their receipt, on or about September 29, October 1, August 3, and October 1, 1937, respectively. Count five refers to the letter reporting the progress of the committee, sent out to all bondholders on April 5, 1938, after Buckner's return from Manila. Count eight is the conspiracy charge.

"We think the proof is insufficient as to counts one and six. At the time, early in July, 1937, when these first solicitation letters were mailed, no fraud appears to have been committed. The first committee deposit was made on July 10, the first withdrawal on July 12, 1937. The petty night club misappropriations did not occur until later in July; the major scheme to take secret speculation profits at the bondholders' expense was not shown to have then been formulated. Nor is there any unequivocal evidence of a then existing intent to misappropriate the funds solicited. True, there is proof of the desire of Buckner and Gillespie to direct and control the committee, of their refusal to follow advice as to the solicitation of funds for expenses, and even of the tampering with the resolution preventing withdrawals of funds from the bank without the countersignature of their counsel. But as to the latter it appeared that their counsel wished to avoid this responsibility, and the evidence does not prove that the resolution was altered in order that the funds might be misused. Subsequent acts, too, may often support an inference of prior intent, but we do not think the evidence sufficient to permit the jury to do so here. It does not seem a proper inference that, at the inception of negotiations involving millions, a budding financier, whatever his aspirations as a playboy, would have solicited money from bondholders with a preconceived intention to misappropriate the funds in the petty dissipations disclosed at the trial. As to the more serious frauds involving market tips

and the sharing of secret profits, it is quite possible, on the evidence submitted, **that Buckner did not turn to this method of doing business until the legitimate sources of securing moneys for committee expenses had been tapped dry.** Compare Hass v. United States, *supra;* Beck v. United States, 8 Cir., 33 F. 2d 107, 111."

EVIDENCE OF COLLATERAL MATTERS

On the theory that they afforded legitimate and proper proof of "system" or "intent" against Weiss, numerous matters of evidence, relating to at least a dozen transactions entirely disconnected from the subject matter of the indictment, were admitted by the trial judge, over defense objections. To discuss them all fully would require a detailed review of the facts of each, and then a comparison with the facts of the main case. This, we fear, would enlarge the present application beyond the contemplation of Rule 38 of this Court. We will content ourselves with summarizing the more flagrant errors of this character, in the hope of presenting a *prima facie* showing for a writ of review, and, if same be granted, we will then be able to go into greater detail.

In the first place, the charge under the indictment was one of fraud in two ways, first by altering a contract price, then by inflating charges for extras, and, most specifically of all, by **concealing from the constituted authorities in charge of the institution** that the price change had been made and the proper charges for extra work had been exceeded. We respectfully call to the attention of your Honors that the allegation of the false pretenses, which is indispensable to an indictment for mail fraud, expressly relies upon the concealment of the increased prices from the authorities of Louisiana Polytechnic Institute as the meat of the fraud. Such

was the nature of the criminal act charged to have been done by Weiss in the case affecting Louisiana Polytechnic Institute.

To illustrate the alleged guilty intent of Weiss in such alleged concealment from the officials of Louisiana Polytechnic Institute, the prosecution then brought up two groups of transactions, one group occurring at Louisiana State Normal College, and the other group occurring at Louisiana State University. Had the prosecution stopped here, the situation would have been bad enough, but they attempted to add inference on top of inference, by going in evidence to a still further group of transactions, using this only secondly related group in the hope that the jury would infer guilt against Weiss in the first related group, and thus infer guilt against Weiss in the case in chief.

What we mean by this, for example, is that the episode of the experimental switchboard at Louisiana State University was introduced in evidence as a possible inference of Weiss' guilty intent in the Louisiana Polytechnic transaction. But it was not clear even then that Weiss had done anything wrong in connection with the experimental switchboard payment; so the prosecution proceeded to a third stage. It offered a check for $2,500.00, **which was a collateral matter even to the experimental switchboard matter;** and this third stage of the proceeding, the $2500.00 check in the Marks-Isaacs department store matter, was certainly a transaction bearing not the slightest similarity to the Louisiana Polytechnic transaction under the indictment.

For another example of the extreme degree to which this sort of thing was allowed to be carried, the prosecution was permitted to offer evidence about an alleged excessive payment to Louisiana State University on the

restoration of the While Female Building on the Charity Hospital grounds. After this evidence was in it was not clear that Weiss had done anything here with wrongful intent; so again the prosecution proceeded to a third stage in this kind of proof. It offered, and was allowed to prove, for the purpose of showing a realization of wrong-doing in the final payment on the White Female Building, that Hart, not Weiss, **and out of the presence, and without the knowledge of Weiss,** had concealed the White Female Building payment in the Animal Industry Building account on the books of Caldwell Bros. & Hart. This, of course, proved no guilty knowledge against Weiss, but it was calculated to add prejudice against him.

The evidence concerning the business of the Southern Dairy Products Company was in effect a collateral matter secondly removed from all other transactions in the case. In order to strengthen a possible inference of the guilty intent of Weiss in the Louisiana Polytechnic transaction, all of the collateral transactions with Caldwell Bros. & Hart were offered; and then, in order to draw a separate inference of guilt out of those collateral matters, **the further collateral matter** of the relations of Caldwell Bros. & Hart and the defendant Weiss in the dairy company was put in evidence.

But even more remote and dissimilar from any of these, were the transactions, allowed to be gone into before the jury, (1) between Weiss and Leche on the latter's building contract in St. Tammany Parish, and (2) the transaction of the $75,000.00 check with Dr. Smith. There was not the slightest detail of similarity between the indictment case on the Louisiana Polytechnic job and the Leche job in St. Tammany Parish. The latter was so utterly unrelated to anything in the main case that it was plainly offered to prejudice the accused in violation of the general rule of evidence on relevancy. In

the hostile state of the public mind toward Leche at the time of the trial, a showing of any connection between Weiss and Leche, particularly on "the Gold Coast of St. Tammany Parish", as the Assistant United States Attorney attempted to bring out on cross-examination, was well calculated to prejudice Weiss in the eyes of the jurors.

The incident of the $75,000.00 check of Dr. Smith was the most glaring error, of admission of evidence, committed by the Court. In the prosecution's anxiety to prove against Weiss that he had been the recipient of some benefits from Smith, they over-reached themselves, we think. There was put into evidence, and allowed to go into evidence, without proper investigation, and without opportunity to the defense for investigation, this proof of the handling of the $75,000.00 check between Smith and Weiss. It not only had nothing to do with, and no similarity to, anything which had occurred on the Louisiana Polytechnic job, **but it has turned out that this $75,000.00 check was not even connected with any of the construction or architectural transactions at Louisiana State University.** It was a wholly independent, and thoroughly dissimilar transaction; independent of everything in the case, **even the other collateral proof which it may have been thought by the prosecution to relate to.** In final analysis, it was simply a link in a scheme of Dr. Smith, in which Weiss, through his trust in the integrity of Dr. Smith, had been used in passing, by Dr. Smith, as a dupe in connection with one of Smith's operations of gambling in the stock market. That the matter of this $75,000.00 check was quite collateral to the indictment case must be conceded; that it was in no way similar to the transaction on trial cannot be denied; and that it is bound to have been highly prejudicial to Weiss is shown by the trial judge's own comment, when he once

declined to admit any evidence about alleged relations of Weiss with Dr. Smith, saying that the very fact that Dr. Smith was notoriously known to be then in the penitentiary would, of itself, prejudice Weiss.

In his argument, the Assistant United States Attorney repeatedly charged Weiss before the jury with having received this $75,000.00 from Smith. We are sure he was at the time honest in this belief, or he would not have made the direct statement. We are also sure that representatives of the government then in the courtroom knew that he was making a mis-statement and purposely refrained from correcting him. This mis-statement was bound to have created great prejudice against Weiss, and hence we say that the admission of the evidence on the $75,000.00 check was not only an error, but highly prejudicial error.

Likewise, the whole basis of the indictment case was that Weiss, as architect, **had concealed from the Louisiana Polytechnic authorities** the correct obligations of the institution for the work done, by secretly increasing the contract price, and by allowing excessive charges for extras. In all of the instances at Louisiana State University used in collateral proof, the approval of the contractors' prices was always with the knowledge, on the specific approval, **and on some occasions by the instructions of the school authorities.** Take, for instance, the compromise of the contract for the Dental School foundation, the price of which was settled, not by the architects, **but by the president of the university,** where the architects merely carried out his instructions. Take also the instance of the bookstacks in the Law School building, **where the architect certified, in writing, to the president of the university, what the lowest bid was for this equipment, and the president of the university himself made the contract for a higher price,** and personally

approved, in writing, the certificates of the architect when they were issued **in accordance with the contract he had made.** In fact, all of the payments at Louisiana State University which have been referred to in this trial were personally examined and approved, and usually directed by Dr. Smith, and your Honors will find, on every certificate in evidence relating to a Louisiana State University job, the cryptic endorsement "O.K.—J.M.S." Additionally, in most of the Louisiana State University work, unlike the Louisiana Polytechnic job, the transactions referred to involved incidentals on which the architects exercised no supervisory authority, and on which they served the university as a matter of accommodation and without charging any architects' fees. This is well illustrated by the examples of the compromise of the contract for the foundations on the Dental Building and the restoring of the White Female Building. It happened that Weiss, Dreyfous & Seiferth had designed the large Dental School Building, the project to build which was later abandoned. They had been paid a fee for the un-used plans and specifications, but they were not paid anything, nor did they claim anything, for any further work. When they were asked to issue a certificate in compromise of the foundations contract, they did it for Dr. Smith as a matter of routine and without expecting any pay for what they then regarded as a mere clerical detail. The same is true as to the inspection made, at the request of Dr. Smith, of the work done in remodelling the White Female Building (which it was later learned had actually been performed by the mechanics of Charity Hospital, not the employees of Caldwell Brothers).

While it is probable that eventually Weiss, Dreyfous & Seiferth would have been paid (they never have been paid) architects' fees based on the cost of the experimental switchboard in the Physics and Mathe-

matics Building and the bookstacks and furniture in the Law School Building, at Louisiana State University, it is also a fact that those installations were matters more or less incidental to the real job of the architects, the construction of the buildings proper. We can fairly assume, from the fact that nothing was brought up about it, that no such irregularities existed, on the construction jobs proper at Louisiana State University, of the character of the irregularities at Louisiana Polytechnic Institute charged in the indictment. We contend that it is not compliance with the sort of similarity the law of evidence requires, to compare what happened on incidental and accessory matters, not directly under the supervision or entirely within the responsibility of the architects, with what happens on a main building contract, such as the Louisiana Polytechnic job.

For all of these reasons, we earnestly contend that much, if not all, of the collateral proof admitted in evidence, and which we vigorously objected to at all times during the trial, was improperly admitted under the rules of evidence, led to great confusion in the minds of the jurors, and otherwise deeply prejudiced them against the accused.

Let us turn our attention more particularly, however, to the episode of the $75,000.00 check which we have most vigorously complained of, and which, as we have pointed out, was the basis of the dissent by Judge Sibley in the Circuit Court of Appeals for the Fifth Circuit. It becomes necessary to review these facts in more detail.

In the examination of the witness Seybold, on Tuesday, October 22nd, 1940, the Assistant United States Attorney propounded the following question (Tr. Vol. I, p. 619):

"Did Monte E. Hart or the firm of Caldwell Bros. & Hart loan any money to the President of that university?"

Any loan of money by the contractors to the president of Louisiana State University, brought up in a trial involving work at Louisiana Polytechnic Institute, appeared to us so far from the subject-matter of the case that we interposed an objection. The trial judge heard argument on this objection out of the presence of the jury. The Assistant United States Attorney said (p. 621) that he proposed to show that the firm of Caldwell Bros. & Hart had loaned President Smith several thousand dollars, and that Hart had turned over to Smith $50,000.00 worth of certificates, or bonds, to use in some speculation; the Assistant United States Attorney further said that his purpose was to show the method by which Hart, together with Weiss, schemed. He further proposed to show that Smith paid Weiss $20,000.00 on an architect's certificate that the university had already paid; and that Caldwell Bros. & Hart had loaned the wife of Dr. Smith money. Then the Assistant United States Attorney outlined other matters he said he intended to prove, including the White Female Ward Building, and the dental building foundations compromise, already discussed in this brief.

The trial judge, at this time, declared (p. 635) that he thought the matter of introducing evidence of transactions with Smith was "too far fetched"; that if it had involved in any sense the corrupting of President Richardson or anybody in connection with the Louisiana Polytechnic Institute, then whatever Hart did under an illegal agreement with Weiss would be the act of Weiss; but the trial judge then thought it was "going too far afield to go into the transaction of the bonds and loans to Smith and so forth at this time" (p. 636). At the

close of this colloquy the trial judge said (p. 640): "There is a good reason why I shall not permit this Smith matter to be gone into unless it falls within that category and that is a matter of common knowledge known to this jury and public generally which is that Dr. Smith is now serving a term in the penitentiary **and it would be highly prejudicial if it were not legally advisable (admissible).**"

After the jury was brought back in, defense counsel asked for a ruling in the presence of the jury in order that a bill of exceptions might be taken. The court ruled that the Government would be allowed to prove such transactions as dealings in which Caldwell Bros. & Hart were the contractors and the defendant was an architect, and which were of a similar nature and transpired along about the same time. The trial judge further said (Tr. Vol. II, p. 641):—"When a situation arises that warrants it, the court will hear enough of the evidence to determine its admissibility, out of the presence of the jury, and then decide whether that transaction is to go to the jury".

We repeat these words of the trial judge in connection with our comment that, although such may have been the intention of the trial judge, it was never carried out. Every piece of evidence objected to, and which was allowed to go in, was given for the first time in front of the jury.

The defense took its bill of exceptions to the ruling above referred to, and the trial judge said: "The objection and ruling will be made general to all evidence of a similar nature" (p. 641). The prosecution then went on to offer its evidence of the collateral matters complained of in this brief. There were times when we made other objections, provoked other rulings, and took

other bills, but these were usually on the spur of an impulse, and we think that even without additional bills we were fully protected in our client's rights by said general ruling of the court.

When we thereafter told the judge that it was impossible to defend at the instant on these numerous other matters, and that all of the defendant's records of other work than the Louisiana Polytechnic job were in New Orleans, he suspended the trial for one day, Wednesday, October 23rd, 1940, to permit defendant and his counsel to make a round trip by automobile of 600 miles within about 36 hours to get the defendant's records. In addition to the fact that very little could be accomplished in such a short time and under such pressure, we were also put at a disadvantage by the fact that the Assistant United States Attorney, we are sure with the best of intentions toward us, gave us a list of those matters he then intended to prove, **but did not include on that list anything about the transaction of a $75,000.00 check between Weiss and Dr. Smith,** which transaction we are about to explain in detail. In fact, after the statement of the trial judge (Tr. Vol. I, p. 640) that he would not "permit this Smith matter to be gone into", we were under the belief that any of the personal transactions of President James M. Smith would be excluded from the case.

We were therefore taken very much by surprise, near the conclusion of the trial, when during the night session of Friday, October 25th, 1940, the Assistant United States Attorney suddenly asked the defendant on cross-examination: "Now Mr. Weiss I believe you had some financial transactions with Dr. James Monroe Smith."

The propounding of such a question, of course, put

us right back to the issue which we had faced on the previous Tuesday afternoon of the trial, and which we thought the court had settled, and which we had not made any preparation to meet during the one day allowed to us by the court to prepare a defense on the anticipated collateral matters. We again objected, and the jury was retired. The Assistant United States Attorney then raised two matters he said he proposed to prove, one an alleged double payment for architect's fees on a university stadium job, and secondly, a bank cashier's check for $75,000.00 given to Weiss by Dr. Smith and endorsed by Weiss. We argued that neither fo these matters was connected in any way, even remotely, with the indictment on trial and were merely being interjected into the case to prejudice Weiss by connecting him with the convicted Smith, along the lines which the court had already commented on.

The trial judge finally ruled (Tr. Vol. II, p. 1069): "I am going to exclude the $20,000.00 transaction. I think it is going back too far and involves too much, but in the statement he made with regard to the $75,000.00 check, **he should be able to make an explanation to stand up under that."**

In other words, the attitude of the trial judge on this entirely unrelated transaction of the $75,000.00 check, utterly dissimilar from any issue of the indictment, **was that the burden should be imposed upon the defendant of explaining that matter to the satisfaction of the jury.** This holding not only violated the rule as to irrelevancy of evidence, but it violated the fundamental **burden of proof** in a criminal case.

The jury was brought back in, and the prosecuting attorney handed the defendant the Exhibit G-56, and asked him if it was not a cashier's check drawn to his

order for $75,000.00 and given him by Dr. James Monroe Smith. We noted our objection.

The court said (p. 1069): "The evidence is admitted for its bearing upon the transaction with respect to the dairy in which the witness has testified that some $75,000.00, represented by the check (checks) paid to him by Hart or Caldwell Bros. & Hart, represented an investment in the company, and having heard counsel out of the presence of the jury, **this evidence is admitted in connection with that particular transaction as throwing some light upon it.**"

It will be seen from this statement by the court that what was in the trial judge's mind was that he was admitting this $75,000.00 check **because it had or might have some relation to the affairs of the Southern Dairy Products Company,** in which it had been already testified that Caldwell Bros. & Hart had invested, and in which Weiss was a leading stockholder. As a matter of fact, with all respect to the then opinions and beliefs of the learned Assistant United States Attorney, the $75,000.00 check **did not have the slightest relationship** even to the Southern Dairy Products Company business, **as the trial judge would have learned if he had given defense counsel a reasonable opportunity to investigate this check and had first heard the real facts of the matter out of the presence of the jury.**

Instead of that, Weiss was confronted with this check on the witness stand, was forced into a naked denial of the prosecution's contentions, and insinuations, without the slightest opportunity to seek the necessary evidence to show the true history of the check. It should be added that neither Weiss nor his attorneys then knew themselves what was the true history of that check.

The night session at which this check was admitted

into evidence lasted until late on that Friday night. The trial was resumed as early as 9 o'clock on Saturday morning, and was pressed almost hurriedly to a conclusion, because it was the week-end. The opening argument of the prosecution was made even before the dinner recess Saturday. There was absolutely no time in which defense counsel could have investigated this $75,000.00 check matter.

As a matter of fact, when Weiss was confronted with the check (Exhibit G-56) on the witness-stand Friday night, defense counsel walked up to the witness-stand and looked at the check. It was offered by photostat, and the same photostat which was handled on that occasion is in the bundle of original exhibits and we ask your Honors to examine it very carefully.

You will see that it is cashier's check No. 4745 of the Discount Department of the National Bank of Commerce, dated at New Orleans on June 15th, 1938 (over one year after the Louisiana Polytechnic job was finished), made payable to the order of Leon C. Weiss, for the sum of $75,000.00, and signed by an assistant cashier of the bank.

Now we ask your Honors to turn the check over. On the back of it appears the endorsed signature of Leon C. Weiss. Under that is the signature of what, we thought in the courtroom, was the name "O. M. Browne", but which we later found out was "J. M. Browne".

It must be explained that the lights in the courtroom around the witness box, where the check was read by defendant and his attorneys, were not bright.

We asked our client on redirect examination (Tr. Vol. II, p. 1133):

"Q. Since the check left your desk has it acquired any additional endorsement?"

"A. Yes, it has the endorsement of a man by the name of O. M. Browne. I believe it is O. M."

Actually the endorsement was J. M. Browne, and we learned later that J. M. Browne was the name of a man through whom, or with whom, President Smith of Louisiana State University had been speculating with the university's money in the stock market.

On the night of the trial, and in the uncertain light around the witness-stand, we read the signature as O. M. Browne, and everybody (and we are sure that this includes both the Assistant United States Attorney and the trial judge) failed to see the most significant thing on the check. Your Honors will have **to look close to see it in daylight.**

THERE WAS THE FURTHER ENDORSEMENT, BY STAMP, UNDER THE SIGNATURE OF BROWNE, OF THE WORDS, TWICE STAMPED: "FOR DEPOSIT, FENNER & BEANE."

In the absence of any knowledge at the time as to who Browne was, and due to the failure of anybody to notice the deposit endorsement of the brokerage firm of Fenner & Beane, the Assistant United States Attorney, despite Weiss' denials, stood up before the jurors next morning and told them eloquently, emphatically and repeatedly, that Weiss had gotten $150,000.00, that he had gotten $75,000.00 from Caldwell Bros. & Hart, and he had gotten another $75,000.00 from James Monroe Smith. Before a jury of farmers and small business men this declaration, made over and over again in argument by the Assistant United States Attorney, backed up by the admission by the trial judge of the $75,000.00

check in evidence, was a tremendous prejudice, and we think sealed the fate of the defendant before that jury.

The outrageous thing about this situation was that government agents were in the courtroom, assisting the prosecution in these collateral matters, who, we learned afterwards, had thoroughly investigated the history of this check, knew where this $75,000.00 had gone, but who sat silent while the Assistant United States Attorney repeatedly voiced his charge that Weiss had gotten this money, without telling the prosecutor, we are sure, what the actual facts were.

As soon as we got back to New Orleans and the banks opened Monday morning, defense counsel went to the National Bank of Commerce to trace the history of this check. In the apparent absence of a deposit stamp on it, we assumed that it had been cashed at the bank which issued it. To our surprise, we found that it had been cleared through the Whitney National Bank before payment by the National Bank of Commerce. We investigated further and found that, in the Whitney National Bank, it had been paid to the account of the well known stock brokerage house of Fenner & Beane.

We telephoned the courthouse at Monroe and asked somebody to look closely at Exhibit G-56, and when it was examined in daylight, we were informed that the very faint deposit endorsement, by stamp, of Fenner & Beane, was found thereon.

We went to the office of Fenner & Beane and examined the account to which this $75,000.00 had been credited and learned who J. M. Browne, not O. M. Browne, was; and with all of this information, we reconstructed the following true history of the check, which convincingly shows that Mr. Weiss had told the truth, that he

had not himself gotten this $75,000.00, or any part thereof, and that in the transaction he had been made the unwitting tool of the scheming Smith.

Smith, as is well known now, had been gambling in the stock market, using the treasury bonds of Louisiana State University as collateral. He had arranged a loan, on a block of these bonds, from the National Bank of Commerce on June 15th, 1938, the date of the $75,000.00 check. He, evidently to make it appear as though he were getting the money for purposes of the university, and not for himself, asked the officers of the National Bank of Commerce to issue this $75,000.00 check to the order of Leon C. Weiss, explaining that Weiss was architect for the university. He then took the check to Weiss at the latter's office, and offered to pay it on account of fees, intending, we assume, to ask for the loan of it back, as he had done on another occasion in connection with certain bonds of the university (given to the architects in payment for work at a time when the university was short of cash). Weiss probably upset this intention by telling Smith that the university did not owe his firm anything like $75,000.00; whereupon Smith said that it was evidently a mistake in amount, that he did not want to take the check back to the National Bank of Commerce, where the money had been borrowed, and for Weiss to accept the check and give the university the check of Weiss, Dreyfous & Seiferth in refund.

Pursuant to this suggestion, Weiss not only endorsed the National Bank of Commerce check, but had a clerk in his office write out a firm check for the equivalent amount. Then, on further thought, Weiss changed his mind about this procedure, and told Smith to either get a new check from the National Bank of Commerce or deposit the endorsed check directly in the university's

bank account. He had the firm check, already written, cancelled on the stub in the firm's check-book, as we found it in our investigation.

All this had happened two and a half years before the trial. It may seem an unbusiness-like way of handling the check, from the viewpoint of Weiss, who thus put into circulation a check for that large amount bearing his endorsement. And yet it must be remembered that, in the first place, it was a check which had the entire resources of the National Bank of Commerce behind it (unlike a personal check), and, secondly, the man who was handling the check was, at that time, June 15th, 1938, and for at least a year afterward, the highly respected and completely trusted head of the State's university. There was no reason for Weiss, at that time, not to share the same complete confidence in Dr. Smith which Smith enjoyed from the large board of directors of the university, composed of many of the most responsible and reputable business and professional men of Louisiana.

Under these circumstances, Smith departed from the office of Weiss with this endorsed check for $75,000.00 in his pocket. He obviously carried it to J. M. Browne, through whom he was carrying on his gambling operations with the Fenner & Beane office. Browne took the check to that office, where the amount was divided, $56,000.00 being apportioned to a trading account in the name of Dr. Smith himself, and $19,000.00 being apportioned to a trading account in the name of Mrs. Owen Ware, Dr. Smith's daughter.

It was clear from this record that neither Leon C. Weiss or the Southern Dairy Products Company had ever received one penny from this check. When the trial judge (p. 1069-1070) said he was admitting the check

in evidence "for its bearing upon the transaction with respect to the dairy", he was not only letting a very remote and disconnected, **and recognized by him as prejudicial** (p. 640) matter get before the jury, but his own basis of admission of same **was completely false in its predicate.** Had he done the things, which any defendant should be entitled to in a trial with deliberation and care, first, afforded adequate time to defense counsel to prepare the trial of new issues, and secondly, looked into the evidence of collateral matters before admitting it, this check for $75,000.00 would never have been allowed in the record. Having been admitted, the fault should now be remedied.

After having assembled these true facts of the history of the $75,000.00 check, which, the Assistant United States Attorney had argued, was paid by Dr. Smith to Mr. Weiss, to the great prejudice of Weiss before the jury, we immediately filed a motion for a new trial on the grounds of this newly discovered evidence, pleading our surprise by the offer of the check at the night session on October 25th, and our inability to have gotten this evidence before the close of the case (see motion for new trial, Tr. Vol. I, pp. 78-91). In this motion, made under oath, we offered to produce the records of the National Bank of Commerce, the Whitney National Bank, J. M. Browne, and Fenner & Beane, and the testimony of all parties related to the transaction. This motion was overruled and we duly reserved our bill of exception.

The well established rule of law is that where, after trial, a party discovers evidence which would have controlled an issue, and the existence of which he was not aware of, or by reasonable diligence could not have been aware of, at the time of his trial, upon a proper showing

of ability to timely produce such newly discovered evidence, he is legally entitled to have the issue tried anew.

We respectfully submit that every element of this rule is complied with in our situation under our motion for a new trial. In the first place, we were taken by surprise by this evidence. After the trial judge's previous ruling that he would not admit evidence of any transaction between Weiss and Smith, in which he added that Smith's confinement in the penitentiary was bound to prejudice Weiss, we dropped any idea that the court would permit evidence of this kind. When we left Monroe for New Orleans on the evening of October 22nd, 1940, for the purpose of assembling evidence on collateral issues, the Assistant United States Attorney gave us a list of the matters to be used in evidence against Weiss. The incident of the $75,000.00 check of Dr. Smith was not on the list. Therefore, when the matter was brought up at the night session of October 25th, 1940, we were totally unprepared to meet it, and there was nothing we could do about it between then and the end of the trial next day.

That the evidence which we discovered in New Orleans two days later would have controlled the issue cannot be doubted. The question, under the production of the check, was whether Weiss, the first endorser thereof, had gotten the money. Weiss denied it, but was not then in a position to explain where the money had actually gone. The Assistant United States Attorney argued to the jury that the check spoke for itself and demonstrated that Weiss had gotten the $75,000.00.

Had the real proof then been available, we would have shown that Dr. Smith spent this $75,000.00 of Louisiana State University's money in stock gambling operations **which Weiss was not connected with in anyway,**

and that Weiss **had not received one penny** of the proceeds of this check.

We respectfully submit that, by every test of the rule on the granting of new trials because of newly discovered evidence, this situation presented, in our humble opinion, the most positive instance, of a right to the setting aside of a verdict and the granting of another trial, which has come under our observation in more than twenty-five years of experience at the criminal bar.

We respectfully submit that it was gross judicial error to have refused to thus correct the mistake which had been made by the admission into evidence of the document Exhibit G-56; bearing in mind, of course, that not only did the Assistant United States Attorney ask Weiss about the check in cross-examination, but after Weiss had legally bound him on this collateral matter by denying receipt of the money, **the United States District Attorney was allowed to contradict Weiss by putting the check itself in evidence and handing same to the jurors for their inspection.** This constituted not merely cross-examination, but affirmative evidence of a collateral matter made by the prosecution to create before the jury an issue of fact with the defendant's denial made on his cross-examination.

CONCLUSION

In the sound judicial discretion of this, the highest court in the land, the last resort from injustice to the citizen, it is earnestly prayed by petitioner that a review of this case on a writ of certiorari will be granted. It is sincerely believed by him and his counsel that whatever may be the aspect of his case, shaped amid the excitement of the recent Louisiana scandals, given color of prejudice against him by participation in the events

described of notorious scandal figures of the times, however dark that aspect now seems, petitioner would not have been convicted had he been given a trial free from the errors complained of in this brief.

There are special and important reasons for a review of this case, aside from petitioner's own interest in its outcome. On both of the points of procedure which we have attacked, (1) the duplicity of the counts by reason of the two separate alleged schemes to defraud, and (2) the admission of improper so-called "system" or "intent" evidence, as illustrated by the aggravated instance of the $75,000.00 check, we think the Circuit Court of Appeals for the Fifth Circuit has decided important questions in an untenable way, and has sanctioned departure by the trial court from the accepted and usual course of judicial proceedings. We consider that the decision of the Fifth Circuit in this case is in conflict with a decision of the Second Circuit (*U. S. v. Buckner*, 108 Fed. (2d) 921).

And while we fully appreciate that at the bar of this august tribunal all men, regardless of station in or past habits of life, stand equal to the acid test of what we call due process, it still seems that one shining shield against suspicion, prejudice, and doubt, should be an admitted high character and fine personal record for a lifetime.

The petitioner is nearly 59 years old. In 1903 he graduated from Tulane University with the highest academic distinction (*summa cum laude*). He gained his master's degree, and subsequently taught at Tulane. He served his country in the First World War, rising to a captaincy; and since the close of that war has practiced architecture, living at New Orleans. He served for three consecutive terms as president of the Louisiana Chapter of the American Institute of Architects, and has had

many other important honors, civic and professional. He is not, and has never been, a politician, or one of the group of politicians which recently brought Louisiana into notoriety. On the contrary, his work in architecture in Louisiana attests to his strict application to professional study, and he is pardonably proud of a new high standard in public building in his State which he has helped create, and which has produced, through his firm, such noted buildings as the present State Capitol at Baton Rouge and the large new Charity Hospital group at New Orleans. All of this took, on the part of petitioner, a tremendous concentration of effort in a comparatively short space of years, and left him little opportunity ot analyze men and their motives. He is of the serious, student type, and there is no doubt that on many occasions he has been seriously imposed upon. But his own reputation for ability, honesty and fair dealing is well established, and even the government's witnesses in this case plainly displayed a favor toward and a respect for the accused, in spite of the events they were testifying about. His parents were honorable and respected citizens, as are those of his wife, and his two little girls and his son have a father to be proud of, except for the present shadow upon them.

A long life of honorable service should deserve a scrupulous fairness of trial on an accusation of crime. To the end that this should be accomplished, we plead for a review of this trial.

Respectfully submitted,

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Oct. 9, 1941.